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No. 00-581

IN THE
Supreme Court of the United States
October Term, 2000

CBS, INC.; WESTINGHOUSE PENSION PLAN,

Petitioners,

v.

HARRY BELLAS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE ERISA INDUSTRY COMMITTEE AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE ERISA INDUSTRY COMMITTEE AND THE AMERICAN BENEFITS COUNCIL TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The ERISA Industry Committee ("ERIC") and the American Benefits Council ("the Council") hereby move, pursuant to Rule 37.2, for leave to file the attached brief

amicus curiae in support of the petition for writ of certiorari in this case. Both ERIC and the Council are associations whose members sponsor and maintain pension and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* While the petitioner has consented to the filing of this brief, respondent Harry Bellas has declined to consent. Correspondence reflecting the consent of the petitioner has been lodged with the Clerk.

ERIC is a nonprofit organization representing America's largest employers that maintain ERISA-covered pension and other employee benefit plans. All of ERIC's members do business in more than one state, and many have employees in all fifty states.

The Council, formerly the Association of Private Pension and Welfare Plans, is a broad-based nonprofit trade association founded in 1967 to protect and foster the growth of this Nation's private employer-sponsored employee benefit plans system. The members of the Council include both small and large employer sponsors of employee benefit plans, including many Fortune 500 companies, as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations.

Together, ERIC and the Council have over 350 members that sponsor, administer or advise pension plans covering tens of millions of employees nationwide. The member companies of ERIC and the Council have a strong interest in this case, which will have far-reaching effects on employee pension plan design and administration. Many employer-members of ERIC and the Council have or have had plant shutdown provisions or other job separation benefits in their pension plans, and many other member employers may consider adding or enhancing such benefits in the future, whether as a result of collective bargaining or otherwise. These employers are now subject to sharply conflicting guidance from the lower courts and from the U.S.

Treasury Department as to the applicability of ERISA's "anti-cutback" rule to plant shutdown benefits. This conflicting guidance and the resultant unpredictability undercuts one of ERISA's primary goals – nationwide uniformity in pension plan administration – and works to the detriment of both employers and employees.

Unless it is reviewed and clarified by this Court, the decision below is sure to cause uncertainty in the administration of plans, interfere with the collective bargaining process (whereby companies and unions negotiate changes to plant shutdown benefits), generate new uncertainty in other contexts regarding the anti-cutback provision, and cause inconsistent administration of plans from Circuit to Circuit.

Because of the importance of these issues to ERIC, the Council, and their members, they respectfully move for leave to file the attached brief *amicus curiae* to assist the Court in evaluating the petition for certiorari in this case.

Respectfully submitted,

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BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The ERISA Industry Committee ("ERIC") and the American Benefits Council ("the Council") respectfully

submit this brief *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTERESTS OF AMICI CURIAE

The interest of ERIC, the Council, and their members are set forth in the foregoing Motion for Leave to File.

STATEMENT

The "anti-cutback" rule is found in ERISA Section 204(g) and in a parallel provision to the Internal Revenue Code, I.R.C. Section 411(d)(6). It provides that the "accrued benefit" of a participant under a pension plan "may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g)(1).[2] In 1984, in the Retirement Equity Act ("REA"), Pub. L. No. 98-397, Congress extended the anti-cutback rule to early retirement benefits and other retirement-type subsidies. As amended, the rule provides that a plan amendment will be treated as impermissibly reducing accrued benefits if the plan amendment has the effect of "eliminating or reducing an early retirement benefit

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity, other than *amici curiae* and their respective members, made a monetary contribution to the preparation or submission of this brief.

[2] The case law generally focuses on the ERISA version of the anti-cutback rule, doubtless because private lawsuits such as this one may be brought to enforce various requirements of ERISA but not the corresponding provisions of the Internal Revenue Code. The Treasury Department and the I.R.S., from which administrative guidance and any pertinent regulations would emanate, typically refer to the Code version of the rule. For convenience, we use the term anti-cutback rule to refer to the two statutory provisions interchangeably.

or a retirement-type subsidy (as defined in regulations)." 29 U.S.C. § 1054(g)(2)(A).[3]

Despite the statute's anticipation that "retirement-type subsidies" would be "defined in regulations," to date the Treasury Department has not proposed or promulgated regulations defining that term. Instead, the Treasury has issued a regulation in which it describes certain benefits that should not be treated as accrued benefits for purposes of I.R.C. § 411(d)(6). 26 C.F.R. § 1.411(d)-4. Those regulations do not define early retirement benefits or retirement-type subsidies, and expressly fail to "address the extent to which a plant closing or shutdown benefit under a plan constitutes an early retirement benefit or a retirement-type subsidy." 53 Fed. Reg. 26051 (1988).

The only general guidance from the Treasury Department as to what constitutes a "retirement-type subsidy" for purposes of the anti-cutback rule is found in I.R.S. General Counsel Memorandum No. 39869 (April 6, 1992) (hereinafter "GCM 39869"). Pet. App. 91a. GCM 39869 responds to a request by the Director of the I.R.S.'s Employee Plans Technical and Actuarial Division for guidance on the subject of "shutdown benefits." *Id.* It broadly defines shutdown benefits as those that "become available to plan participants upon the occurrence of a specific event described in the plan that causes the

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[3] Any such regulations would be promulgated by the Treasury Department pursuant to Reorganization Plan No. 4, reprinted in 1978 U.S.C.C.A.N. 9814, in which President Carter transferred the authority of the Department of Labor to issue regulations under certain ERISA sections to the Department of the Treasury. *See also* 29 U.S.C. § 1202(c); *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1115 (9th Cir. 2000) (explaining that Treasury regulations pursuant to I.R.C. § 411 are considered controlling wih regard to the corresponding provisions of ERISA Section 204).

participants' employment to terminate as a result of a change in the organization or operation of the employer." Pet. App. 93a. GCM 39869 addresses the broad question "whether qualified pension plans may generally provide for shutdown benefits and, if so, whether shutdown benefits are protected benefits under section 411(d)(6)." Pet. App. 93a. It advises that some but not all shutdown benefits should be considered "retirement-type benefits" (Pet. App. 99a), and that shutdown benefits that are retirement-type benefits "become an accrued benefit and therefore protected under section 411(d)(6) *upon the occurrence of the event that triggers the right to the benefits (i.e., the contingent event).*" Pet. App. 101a (emphasis added). This language has been widely understood to mean that such benefits may safely be eliminated or modified prospectively, that is, before the shutdown, job loss or other triggering event occurs.

In 1994, under the authority of GCM 39869, the Westinghouse Pension Plan was amended by its employer sponsor, now Viacom, Inc., to modify and then eliminate a plan provision that provided "shutdown benefits" (as broadly defined in GCM 39869) to employees who met certain age and service requirements and who were terminated as a result of a permanent job separation. The amendment eliminating these benefits received a favorable determination letter from the I.R.S. Despite GCM 39869, the I.R.S. determination letter, and at least two circuit court decisions to the contrary, the Third Circuit in the decision below concluded that the amendment violates the anti-cutback rule.

Plant shutdown provisions such as the one at issue here are not uncommon. ERIC and the Council have member employers whose defined benefit pension plans include or have included a provision for benefits contingent on some future event such as a plant shutdown, job relocation, or other permanent job separation. Such benefits may take a variety of forms, such as monthly payments for specified periods or life annuities, and may be triggered by any one of a variety of contingent events that result in

employment loss. How many employers might consider adding such benefits in the future – as a result of collective bargaining or otherwise – cannot be known, although it is certainly safe to assume that most employers would resist adding or expanding such benefits if the anti-cutback rule prevented the employer from eliminating or curtailing those benefits in the future.

REASONS FOR GRANTING THE WRIT

I. ERISA's Goal of National Uniformity Cannot Be Met As Long As Employers Are Subject to Conflicting Standards With Respect to Modifying or Eliminating Plant Shutdown or Other Job Separation Benefits.

Amici urge the Court to grant the petition for certiorari. Employers are currently subject to different and conflicting standards with respect to the propriety of plan amendments that modify or eliminate shut-down or similar job separation benefits as part of defined benefit pension plans.

As Congress recognized when it enacted ERISA, employers cannot fairly and effectively negotiate and administer employee benefit plans with multi-state coverage unless questions concerning the rights of plan participants and beneficiaries are resolved under uniform principles of federal law. Prior to ERISA, employee benefit plans were regulated by a patchwork of state statutes and state common-law rules. An employer who sought to maintain a uniform employee benefit plan for a multi-state work force encountered severe administrative difficulty and expense in complying with rules that differed from state to state. Employers were often prevented from providing their employees with the best possible benefits at the most reasonable cost.

This Court has repeatedly stated that one of the primary purposes behind ERISA's enactment was to achieve

uniformity in pension plan regulation. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (holding that ERISA's preemption provision "was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law" and that "[o]therwise, the inefficiencies created could work to the detriment of plan beneficiaries"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107 (1983) ("By establishing benefit plan regulation 'as exclusively a federal concern,' Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees.") (citation omitted).

On the question presented in this case, the patchwork system of regulation that Congress sought to avoid with ERISA's enactment is continuing, not because of varying state laws but because of different interpretations of federal law advanced in the federal circuit courts. As the Third Circuit candidly acknowledges, its conclusion that Section 204(g) precludes an employer from amending a pension plan to eliminate or modify job separation benefits on a prospective basis, while supported by the Fifth Circuit is in direct conflict with decisions by the Sixth and Eleventh Circuits. Pet. App. 30a, 31a.

In *Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329 (6th Cir. 1988), the Sixth Circuit reviewed the language and history of the anti-cutback rule as amended by the Retirement Equity Act and held that plant shutdown benefits do not "fall within the category of a retirement-type subsidy." *Id.* at 333. Similarly, in *Roper v. Benton*, 859 F.2d 1472 (11th Cir. 1988), the U.S. Court of Appeals for the Eleventh Circuit cited *Ross* approvingly and held that the anti-cutback rule does not apply at all to "plant shutdown plans." *Id.* at 1473.

In *Harms v. Cavenham Forest Industries*, 984 F.2d 686 (5th Cir. 1993), on the other hand, the court held that a severance plan that promised benefits "calculated similarly to retirement subsidies" and that were payable for life was protected from cutback under Section 204(g). The court

distinguished *Ross* as being limited to "plant shutdown benefits," and not severance payments generally. *Id.* at 692. In the decision below, the Third Circuit, unlike the Fifth, draws no distinction between plant shutdown and permanent job separation benefits and appears to hold that many benefits designed to "bridge" a separated employee to the benefits available at normal retirement age cannot be modified or eliminated by an employer without allowing current employees to age into those benefits. Presumably this would hold true even for employees who would not qualify for the contingent benefit for thirty or more years, and even if the employer may have eliminated the benefit in return for granting other benefits, or replaced it with other severance benefits.

The importance of national uniformity in ERISA plan regulation is acute. Without it, employers cannot provide a uniform system of benefits to their workforce. Until this Court resolves the conflict among the lower courts, an employer with a shutdown or job separation provision can amend it in some jurisdictions and not in others, and no employer, in any federal jurisdiction, is likely to risk adding or improving such benefits under a pension plan without being confident as to whether the benefits can subsequently be modified or eliminated.

The conflict among the Circuits is only exacerbated by ERISA's venue provision, which permits suit to be brought in any district where a defendant resides or may be found, or where the alleged breach took place, or where the plan is administered. 29 U.S.C. § 1132(e)(2). It is not uncommon for an employer to find itself sued in a judicial district where it has never done business, simply because a former employee has moved or retired there. ERISA's permissive venue provision therefore invites forum shopping when the Circuits apply different interpretations of the statute, as they have here.

II. This Court Should Address the Proper Degree of Deference That Should be Accorded by the Courts to Treasury and I.R.S. Interpretations of Complex, Technical Provisions of ERISA and the Tax Code.

This case also presents the Court with the opportunity to consider the propriety of the Third Circuit's failure to accord any deference to GCM 39869, the only generally applicable guidance issued by the Treasury Department as to whether and when plant shutdown or job separation benefits should be treated as accrued benefits for purposes of the anti-cutback rule. The court below approached the issue by relying almost exclusively on its own reading of the legislative history of the highly technical anti-cutback rule. It paid little attention to the text of the critical statutory phrase, "an early retirement benefit or retirement-type subsidy," and ignored completely the statutory command that retirement-type subsidies were to be "defined in regulations" by the Treasury Department.

As the Third Circuit recognized, the Treasury has never issued any such regulations, and it further acknowledged that, in the absence of such regulation, employers such as CBS have "relied reasonably" on GCM 39869 as the next best source of administrative guidance. Pet. App. 44a. In those circumstances, it was wholly inappropriate for the Third Circuit to impose retroactive liability on the plan and potentially subject both employers and employees to "significant adverse tax consequences," unless relief could be obtained from unspecified "others." Pet. App. 43a. As the Seventh Circuit has recognized, when a statute is less than clear on its face and depends on regulations for clarification, the "failure to promulgate regulations as Congress orders could result in a provision not enforceable due to the Secretary's failure." *Pittway Corp. v. United States*, 102 F.3d 932, 936 (7th Cir. 1996).

This Court has repeatedly stated that ERISA is an "enormously complex and detailed" statute, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993), compliance with which requires constant attention and judgment from employees, plan administrators, and their advisors. In the absence of implementing Treasury regulations, employers and their advisers must look to other sources of guidance, including, as in this case, GCM 39869 and the determination letter issued to Westinghouse. In the decision below, the Third Circuit makes clear that they do so at their peril, for the court believed itself under no obligation to give any weight to these sources of administrative guidance.

Amici respectfully ask the Court to grant certiorari in this case to resolve the split among the Circuits and to provide the lower federal courts with greater direction as to their ability to second-guess the administrative guidance on which employers and plan administrators must, by necessity, rely.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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